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IN SUPREME COURT, STATE OF WASHINGTON

SEPTEMBER TERM, 1949

No. 608

GERALD MILLER AND DAVID CAUDILL, FOR THEMSELVES AND FOR THE BENEFIT OF OTHERS SIMILARLY SITUATED, *Respondents,*

vs.

THE CITY OF SPOKANE, A MUNICIPAL CORPORATION; WILLIAM P. PAYNE, COMMISSIONER OF PUBLIC SAFETY; E. W. PARSONS, CHIEF OF POLICE; WILLARD TAFT, KENNETH LAWSON, ARTHUR R. MEEHAN AND WALLACE N. SPROWL, CITY COMMISSIONERS, ALL PUBLIC OFFICIALS OF THE CITY OF SPOKANE, WASHINGTON, *Appellants*

JURISDICTIONAL STATEMENT UNDER AND PURSUANT TO RULE 12, PARAGRAPH 1, OF THE RULES OF THE SUPREME COURT OF THE UNITED STATES.

(a) This is an appeal to the Supreme Court of the United States from a final judgment of the Supreme Court of the State of Washington, reversing a judgment of the Superior Court of Spokane County, Washington, directing the issuance of a permanent injunction against the defendants and appellants from arresting or molesting plaintiffs and others

similarly situated from having in their possession and operating pinball machines in the City of Spokane, Washington, and from seizing, confiscating and destroying such machines, and that such injunction shall remain in full force and effect until the electors of the City of Spokane shall have had an opportunity to exercise the right of referendum by a vote for or against the continued operation of pinball machines within the City of Spokane, Washington.

The City of Spokane, Washington appealed from the judgment of the lower court, and the State Supreme Court reversed the trial court's decision and upheld the validity of Remington's Revised Statute 2472, Laws of 1909, Section 220, page 955, defining gambling devices, and decreeing that pinball machines were gambling devices within the above statute. The federal statutory provision believed to sustain the jurisdiction of the Supreme Court of the United States is Section 1257 clause (2), Title 28 of the United States Code.

(b) The statutes of the State of Washington or the city ordinances and charter provisions of the City of Spokane, Washington, together with portions of the Constitution, the validity of which is involved, so far as pertinent to this appeal, are: Article 11, Section 10 of the Constitution of the State of Washington; Section 83, Article IX, page 6 of the Charter and General Ordinances of the City of Spokane; Sections 12 and 13, Article III, page 1 of the Charter and General Ordinances of the City of Spokane; Section 10, Article III, page 1 of the Charter and General Ordinances of the City of Spokane; Remington's Revised Statute, Sec. 2472; Remington's Revised Statute, Sec. 2472-1, Laws of 1937; Remington's Revised Statute, 2472-2, Laws of 1937; Remington's Revised Statute, Section 8370-96, Laws of 1941; Remington's Revised Statute 8370-100, Laws of 1941, more specifically hereinafter set out as follows:

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Article 11, Section 10 of the Constitution of the State of Washington, as set out in Volume 1 of Remington's Revised Statutes of Washington, Article 11, Section 10, pages 469, 470 and 471, which reads as follows:

"Sec. 10. INCORPORATION OF MUNICIPALITIES.—Corporations for municipal purposes shall not be created by special laws; but the legislature, by general laws, shall provide for the incorporation, organization, and classification, in proportion to population, of cities and towns, which laws may be altered, amended, or repealed. Cities and towns heretofore organized or incorporated may become organized under such general laws whenever a majority of the electors voting at a general election shall so determine, and shall organize in conformity therewith; and cities or towns heretofore or hereafter organized and all charters thereof framed or adopted by authority of this constitution shall be subject to and controlled by general laws. Any city containing a population of twenty thousand inhabitants or more shall be permitted to frame a charter for its own government consistent with and subject to the constitution and laws of this state, and for such purpose the legislative authority of such city may cause an election to be had, at which election there shall be chosen by the qualified electors of said city fifteen freeholders thereof, who shall have been residents of said city for a period of at least two years preceding their election, and qualified electors, whose duty it shall be to convene within ten days after their election, and prepare and propose a charter for such city. Such proposed charter shall be submitted to the qualified electors of said city, and if a majority of such qualified electors voting thereon ratify the same, it shall become the charter of said city, and shall become the organic law thereof, and supersede any existing charter, including amendments thereto, and all special laws inconsistent with such charter. Said proposed charter shall be published in two daily newspapers published in said city for at least thirty days prior to the day of submitting the same to the

electors for their approval, as above provided. All elections in this section authorized shall only be had upon notice, which notice shall specify the object of calling such election, and shall be given for at least ten days before the day of election in all election districts of said city. Said elections may be general or special elections, and, except as herein provided, shall be governed by the law regulating and controlling general or special elections in said city. Such charter may be amended by proposals therefor submitted by the legislative authority of such city to the electors thereof at any general election, after notice of said submission published as above specified, and ratified by a majority of the qualified electors voting thereon. In submitting any such charter or amendment thereto, any alternate article or proposition may be presented for the choice of the voters, and may be voted on separately without prejudice to others."

Section 83, Article IX, page 6 of the Charter and General Ordinances of the City of Spokane, Washington, 1939 Edition, reads as follows:

"Section 83. Referendum: If, prior to the date when any ordinance shall take effect, a petition signed by qualified electors equal in number to ten per centum of the entire vote cast at the last preceding general municipal election, shall be filed with the clerk, protesting against the enactment of such ordinance, it shall be suspended from taking effect. Immediately upon the filing of the petition the clerk shall do all things required by section eighty-two (82) (b) of this article. Thereupon the council shall immediately reconsider such ordinance, and, if it do not entirely repeal the same, shall submit it to popular vote at the next municipal election; or, the council, in its discretion, may call a special election for that purpose; and such ordinance shall not take effect, unless a majority of the qualified electors voting thereon at such election shall vote in favor thereof."

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Sections 12 and 13, Article III, page 1 of the Charter and General Ordinances of the City of Spokane, Washington, 1939 Edition, read as follows:

> "Section 12. Form and Manner of Legislation: All legislation and appropriations of money shall be by ordinance, save where there is a special fund created for a particular purpose; payments from such fund shall be made on order of the council. Every ordinance and resolution shall be in writing and read in full at a council meeting before a vote is taken thereon, and upon every such vote the yeas and nays shall be called and recorded."
>
> "Section 13. Subject of Ordinance: The subject of every ordinance shall be set out clearly in the title thereof, and no ordinance except one making appropriations shall contain more than one subject. Ordinances making appropriations shall be confined to the subject of appropriations."

Section 10, Article III, page 1 of the Charter and General Ordinances of the City of Spokane, Washington, 1939 Edition, reads as follows:

> "Section 10. Meetings: All meetings of the council shall be public. It shall keep a journal of its proceedings, which shall be a public record. The council shall hold at least one legislative meeting each week, and shall hold meetings daily for the transaction of business.
>
> "At any meeting of the council three members shall constitute a quorum, but a less number may adjourn from time to time.
>
> "The council shall provide by ordinance a means by which a minority may compel the attendance of absent members."

Volume 4 of Remington's Revised Statutes of Washington, Section 2472, page 461, reads as follows:

> "Sec. 2472. Possession of Gambling Devices: Every person who shall have in his possession or shall permit

to be placed or kept in any building or boat, or part thereof, owned, leased or occupied by him, any table, slot machine, or any other article, device or apparatus of a kind commonly used for gambling, or operated for the losing or winning of any money or property, or any representative of either, upon any chance or uncertain or contingent event, shall be guilty of a gross misdemeanor. (L. '09, p. 955, Sec. 220.)"

Section 2472-1 of Remington's Revised Statutes, Laws of 1937, Chapter 119, Section 1, page 468 (Volume 4 of Remington's Revised Statutes, page 47 of the 1940 Supplement) reads as follows:

"Sec. 2472-1. Slot machines in places for sale of liquor. Every person who shall bring into this state, buy, sell, lease, deal in, have in his possession, acquire for the use in or keep in any building or boat or part thereof owned, leased, or occupied by him as a public place as defined in section 3, chapter 62, Laws of 1933, Extraordinary Session, as amended by Section 1, chapter 158 of the Session Laws of 1935 (Rem. Rev. Stat., section 7306-3), as distinguished from "club" as defined therein, any slot machine of a kind commonly used for gambling, into which may be or might have been inserted any piece of money or other object and from which as a result of such insertion and the application of physical or mechanical force may issue or might have issued wholly upon any chance or uncertain or contingent event, any piece or pieces of money, or any check or memorandum calling for any money or property, or which check or memorandum is, after issuance, actually redeemed in money or exchanged for property by any person whatsoever, or who shall aid or solicit any other person to do the same, shall be guilty of a felony. (L. '37, ch. 119, Sec. 1, p. 468.)"

Section 2472-2 of Remington's Revised Statutes, Laws of 1937, Chapter 119, Section 2, page 469 (Volume 4, Remington's Revised Statutes, pages 47 & 48 of the 1940 Supplement) reads as follows:

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"Sec. 2472-2. Slot machines in clubs. It shall be unlawful for any club to own or operate any slot machine as hereinbefore described, unless it shall have filed with the office of the Washington State Patrol and the office of the sheriff in the county in which such club is situated a brief description of the type of machine, the name of the person or firm by whom the same was manufactured, the name and address of the person, firm, or corporation in whom the ownership or title to such machine is vested, and the serial number, if any, the purpose of the description being to identify the particular machine so owned or operated and the ownership thereof. (L. '37, ch. 119, Sec. 2, p. 469.)"

Section 8370-96 of the Laws of 1941, Chapter 118, Sec. 1, at p. 388 of the 1941 Supplement of Remington's Revised Statutes of the State of Washington, effective March 21, 1941, reads as follows:

"Sec. 8370-96. Levy and collection of tax—Illegal activities—Computation of tax. From and after the first day of May, 1941, there is hereby levied and there shall be collected from every person a tax for the act or privilege of engaging in business as an operator of certain mechanical devices irrespective of whether such activity shall be legal or illegal under the laws of this state or any subdivision thereof: Provided, however, Nothing in this act shall be construed to legalize any activity now or hereafter declared to be in violation of the laws of this state or any subdivision thereof, but the illegality of any such activity shall not be a defense or bar to the collection of any tax imposed thereon by this act. Such tax shall be measured by the application of rates against the gross operating income of the business as follows:

(a) Upon every person engaging within this state in business as an operator of any pinball machine, iron claw machine, travelling crane or other similar mechanical device wherein the element of skill or a combination of the elements of chance and skill is involved

in determining a pay-out to the player, as to such persons the amount of tax on such business shall be equal to the gross operating income of the business multiplied by the rate of ten per cent;

(b) Upon every person engaging within this state in business as an operator of any mechanical device wherein only the element of chance determines a pay-out to the player, as to such persons the amount of tax on such business shall be equal to the gross operating income of the business multiplied by the rate of twenty per cent. (L. '41, ch. 118, Sec. 1, effective March 21, '41.)"

Section 8370-100, Laws of 1941, Chapter 118, Sec. 1, at p. 390 of the 1941 Supplement of Remington's Revised Statutes of the State of Washington, effective March 21, 1941, reads as follows:

"Sec. 8370-100. Tax additional to other taxes—Exception. Gross operating income taxable under the provisions of this title shall not be taxable under the provisions of Title II of this act (Sec. 8370-4 et seq.), but the tax imposed by this title shall be in addition to any other tax to which the taxpayer may be subject under the laws of this state or any subdivision thereof. The state does not by this title preempt the field of imposing taxes or license fees with respect to mechanical devices hereby taxed, and this title shall not be construed to bar counties and incorporated cities or towns from regulating or prohibiting the operation of any such mechanical devices. (L. '41, ch. 118, Sec. 1, effective March 21, '41.)"

(c) The date of the judgment of the Supreme Court of the State of Washington sought to be reviewed is December 15, 1949, and the date upon which the application for appeal was presented is 7 day of January, 1950.

The plaintiffs and respondents were owners and operators of pinball machines within the City of Spokane, Washington, and on March 28, 1949 the City Council passed an ordi-

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nance, C 10078, prohibiting the possession and operation of pinball machines, and repealing previous ordinances which authorized the operation and possession of pinball machines; and licensing, taxing, regulating and providing for the conduct, inspection and operation of the machines. (R. 83-84.)

Prior to the effective date of Ordinance No. C 10078, a referendum petition satisfying the charter requirements was duly and regularly filed and a proper certification was affixed by the City Clerk, whereupon on May 13, 1949, the City Commissioners and Council reconsidered Ordinance No. C 10078 in order that said ordinance be submitted to a popular vote at the next municipal election (R. 83-84). At the same date of the order referring the passage of the ordinance in question to a popular vote at the next municipal election, the City Council, by resolution, notified the owners of the pinball machines that all persons having machines in their possession after May 23, 1949 would be arrested (R. 84).

Plaintiffs immediately sought the aid of the courts of equity in the Superior Court of the State of Washington in and for the County of Spokane, and sought and obtained an injunction against the defendants, prohibiting them from arresting the plaintiffs and others similarly situated, and further enjoining the defendants from interferring with the operation of the machines or from their confiscation (R. 83).

Ordinance No. C 10078 reads as follows:

"Ordinance No. C 10078

An ordinance prohibiting the possession, maintenance, conduct, operation or use of pinball machines or other devices of like character for rewards, excepting slot machines in private clubs, wherein there enters an element of chance; providing penalties for the violation thereof; and repealing Ordinance No. C9441, passed the City Council December 29, 1947.

The City of Spokane does ordain:

Section 1. Any person, firm or corporation who shall have in his or its possession or who shall conduct, maintain, operate or use, either as owner or owners, proprietor or proprietors, lessee or lessees, employee or employees, agent or agents, any pinball machine or any other automatic or mechanical device of like character, other than slot machines in private clubs as provided by Ordinance No. C 10077, wherein there enters an element of chance, whether the same be played or operated for money, checks, credits or any other thing or representative of value, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine in any sum not exceeding Three Hundred Dollars ($300) or by imprisonment in the city jail for a period not exceeding ninety (90) days, or by both such fine and imprisonment.

Section 2. That Ordinance No. C 9441, passed the City Council December 29, 1947, and entitled, 'An ordinance relating to public morality and good order in the City of Spokane, prohibiting the playing of pinball machines and devices of like character by persons under the age of twenty-one years, requiring the approval of premises where such machines are located, providing penalties for the violation thereof, and repealing Ordinance No. A1250, passed the City Council November 11, 1902, and Ordinance No. C8178, passed the City Council April 23, 1945' be, and the same is hereby repealed.

Section 3. This ordinance shall take effect and be in force thirty (30) days from and after its passage.

Passed the City Council March 28, 1949.

ARTHUR R. MEEHAN,
Mayor.

Attest:

ALEX BROWN,
City Clerk.

Approved as to form:

——— ——— ———,
Corporation Counsel."

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and it is upon this Ordinance that the referendum became effective. This Ordinance sought to repeal Ordinances C9441, Ordinance No. A1250 and Ordinance No. C8178. These ordinances read respectively as follows:

"Ordinance No. C9441 (By Payne)

An ordinance relating to public morality and good order in the City of Spokane, prohibiting the playing of pinball machines and devices of like character by persons under the age of twenty-one years, requiring the approval of premises where such machines are located, providing penalties for the violation thereof, and repealing Ordinance No. A1250, passed the city council November 11, 1902, and Ordinance No. C8178 passed the city council April 23, 1945.

The City of Spokane does ordain:

Section 1. It shall be unlawful for any person, firm or corporation who conducts, maintains, or operates, either as owner or owners, proprietor or proprietors, lessee or lessees, employee or employees, agent or agents, any pinball machine or any other automatic or mechanical device of like character which may be played or operated for money, checks, credits, rewards or any other thing or representative of value to permit or allow any person under the age of twenty-one years to play or operate the same.

Section 2. It shall be unlawful for any person under the age of twenty-one years to play or operate any pinball machine or any other automatic or mechanical device of like character which may be played or operated for money, checks, credits, rewards or any other thing or representative of value.

Section 3. It shall be unlawful for any person, firm or corporation to place any pinball machine or any other device of like character in any premises, the location of which has not been first approved by the commissioner of public safety.

Section 4. The commissioner of public safety shall make such rules and regulations as may be necessary to carry into effect the provisions of this ordinance and for its proper operation, which rules and regulations shall be filed with the city clerk and when so filed shall have the force and effect of law.

Section 5. The commissioner of public safety may suspend or revoke any location approval at any time when in his opinion the further operation of pinball machines or other devices of like character in operation at a particular location would be detrimental to the public peace or morals, or for the violation of any of the provisions of this ordinance or of any rule or regulation promulgated thereunder. The commissioner of public safety shall cause to be served upon the person who is in charge of any approved location and upon such parties as he may deem to be interested therein such reasonable notice as he may determine to be proper of his intention to suspend or revoke his location approval. There shall be included or attached to such notice a statement of the facts constituting the violation charged. Within three days after receipt thereof, such parties shall be entitled to a hearing before the commissioner of public safety. The action of the commissioner of public safety shall be conclusive and not subject to review. It shall be unlawful for any person, firm or corporation whose location approval has been suspended or revoked as herein provided to operate any pinball machine or device of like character at said location during the period of suspension or after revocation.

Section 6. Any person, firm or corporation violating any of the provisions of this ordinance shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine in any sum not exceeding Three Hundred Dollars ($300.00), or by imprisonment in the city jail for a period not exceeding ninety (90) days, or by both such fine and imprisonment.

Section 7. That Ordinance No. A1250, passed the city council November 11, 1902, and entitled, "An ordi-

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nance to prohibit the maintaining, conducting, operating or using automatic nickel-in-the-slot machines, or other devices of like character, wherein there enters an element of chance, 'be, and the same is hereby, repealed.

Section 8. That Ordinance No. C8178, passed the city council April 23, 1945, and entitled, 'An Ordinance relating to public morality and good order in the City of Spokane, prohibiting the playing of pinball machines and devices of like character by persons under the age of twenty-one years, providing penalties for the violattion thereof, and declaring an emergency, be, and the same is hereby, repealed.

Section 9. This ordinance shall take effect and be in force thirty days from and after its passage.

Passed the city council December 29, 1947.

ARTHUR MEEHAN,
Mayor.

Attest:

A. A. BROWN,
City Clerk."

"SLOT MACHINES

ORDINANCE NO. A1250

An ordinance to prohibit the maintaining, conducting, operating or using automatic nickel-in-the-slot machines, or other devices of like character, wherein there enters an element of chance.

The City of Spokane does ordain as follows:

Section 1. Any person or persons who shall conduct, maintain or operate, either as owner or owners, proprietor or proprietors, lessee or lessees, employee or employees, agent or agents, any automatic nickel-in-the-slot machine, or other device of like character, wherein there enters an element of chance, whether the same be played or operated for money, checks, credits, or any other thing or representative of value redeem-

able in money, shall be guilty of a misdemeanor, and, upon conviction, shall be punished by a fine of not less than ten dollars nor more than one hundred dollars, and in default of the payment of the fine imposed shall be imprisoned in the city jail one day for each two dollars thereof.

Section 2. For the purposes of trial and conviction under this ordinance, the possession of any such machine or device that automatically pays money, or checks, or slugs, and commonly known as a cash machine, or keeping the same in any place accessible to the public, shall be prima facie evidence against the person in possession thereof of guilt under this ordinance.

Section 3. This ordinance shall take effect and be in force ten days after its passage.

Passed the city council November 11, 1902."

"Ordinance No. C8178

(By Colburn)

An ordinance relating to public morality and good order in the City of Spokane, prohibiting the playing of pinball machines and devices of like character by persons under the age of twenty-one years, providing penalties for the violation thereof, and declaring an emergency.

The City of Spokane does ordain:

Section 1. It shall be unlawful for any person, firm or corporation who conducts, maintains or operates, either as owner or owners, proprietor or proprietors, lessee or lessees, employee or employees, agent or agents, any pinball machine, or any other automatic or mechanical device of like character which may be played or operated for money, checks, credits, rewards or any other thing or representative of value to permit or allow any person under the age of twenty-one years to play or operate the same.

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Section 2. It shall be unlawful for any person under the age of twenty-one years to play or operate any pinball machine or any other automatic or mechanical device of like character which may be played or operated for money, checks, credits, rewards or any other thing or representative of value.

Section 3. Any person, firm or corporation violating any of the provisions of this ordinance, upon conviction thereof, shall be punished by a fine of not more than $300, or by imprisonment in the city jail for a period not exceeding ninety (90) days, or by both such fine and imprisonment.

Section 4. An urgency and emergency for the passage of this ordinance is hereby declared to, and does, exist, and the same shall take effect and be in force immediately upon its passage.

Passed the city council April 23, 1945.

F. G. SUTHERLIN,
Mayor.

Attest: W. N. SPROUL, City Clerk."

The Supreme Court reversed the trial court on the grounds and for the reason that a pinball machine is a gambling device within the definition of Remington's Revised Statute 2472, Laws of 1909, and that neither the City Commissioners nor the people of the city have the power to enact an ordinance in conflict with a general law of the state (R. 88).

The Supreme Court of the State of Washington assumed that at the municipal election Ordinance No. C10078 would be defeated and would in effect legalize the operation of pinball machines. The Supreme Court was silent, however, on the right of the people to vote the machines out or make them unlawful under their referendum privileges as provided by the State Constitution and the Charter of the City of Spokane. The Supreme Court likewise held

that Remington's Revised Statute 2472 was not repealed by Remington's Revised Statutes 2472-1, Laws of 1937, and Remington's Revised Statute 2472-2, Laws of 1937. The Court, however, was silent as to whether or not Remington's Revised Statute 2472 was not in fact repealed by Section 8370-100, Laws of 1941 Supplement, Remington's Revised Statutes.

The ruling of the trial court was such as to bring the case within the jurisdictional provisions heretofore relied on, in that the trial court held that the plaintiffs should be allowed to operate their lawful business until such time as the question was submitted to the electorate, and to deprive them of that right prior to the election would constitute an unlawful deprivation of plaintiffs' right to enjoy the use and possession of their property without due process of law, or without any process of law whatsoever. The ruling of the Supreme Court reversing the trial court's decision was such as to bring it within the jurisdictional provisions heretofore relied on, in that the Supreme Court of the State of Washington held that by virtue of Remington's Revised Statute 2472, Laws of 1909, prohibited plaintiffs from operating, and such prohibition by virtue of that statute was in fact due process of law.

The cases believed to sustain the jurisdiction of the United States Supreme Court are:

Craig v. *Harney,* 331 U. S. 367, 91 Law Edition 1546, p. 1551;

Ex rel. McCollum v. *Board of Education,* 333 U. S. 203, 92 Law Edition, 648;

Treichler v. *State of Wisconsin,* Volume 94 Law Edition, Advance Opinions No. 1, p. 21;

Terminiello v. *Chicago,* Vol. 93, Supreme Court Law Edition, Advance Opinions, p. 865, at p. 868.

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"Here claims based on the United States Constitution were plainly and reasonably made in the North Carolina suit. The North Carolina Supreme Court met these claims. It met them by saying that the North Carolina statute did not deal with substantive matters but merely with matters regulating local procedure, but whether claims are based upon a federal right or merely of local concern *is itself a federal question* on which this court and not the Supreme Court of North Carolina has the last say. That court could not put a federal claim aside as though it were not in litigation by the talismanic word 'jurisdiction'. When an asserted federal right is denied the sufficiency of the grounds of denial is for this court to decide. Bullington could have come here not merely by the grace of this court on certiorari but on appeal."

Angel v. *Bullington*, 330 U. S. 183, p. 188, 189, 91 Law Ed. 832, p. 836.

This appeal being from a state court, the grounds upon which it is contended that the questions involved are substantial is that the federal question sought to be reviewed was first raised in the trial court by virtue of pleadings in the Petition for Injunction. Paragraph XIV of plaintiffs' Petition for an Injunction reads as follows:

"That the threatened arbitrary, inequitable, unlawful, and fraudulent action of the defendants in seizing and confiscating pinball machines which belong to the plaintiffs, and in arresting the plaintiffs, is a direct invasion and abridgement of plaintiffs' property rights as defined by the Fourteenth Amendment to the Constitution of the United States, in that said action on defendants' part constitutes and will constitute unlawful deprivation of plaintiffs' right to enjoy the use and possession of their property without due process of law or without any process of law whatsoever, and is a direct violation of Sections 3 and 12 of Article I of the Constitution of the State of Washington, in that said acts will deprive the plaintiffs of liberty and property without due process of law."

That the threatened arbitrary, inequitable, unlawful and fraudulent action of the defendants in seizing and confiscating pinball machines which belong to the plaintiffs and arresting the plaintiffs is a direct invasion and abridgement of plaintiffs' property rights as defined by the Fourteenth Amendment to the Constitution of the United States, in that said action on defendants' part constitutes and will constitute unlawful deprivation of plaintiffs' right to enjoy the use and possession of their property without due process of law, or without any process of law whatsoever (R. 7).

The trial court held that the action of the City Council in effect deprived plaintiffs of their property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States (R. 38 to 54).

Quoting from Transcript of Proceedings, page 3, as follows:

> "You will observe, gentlemen, that the City Council, which is your legislative body, evidently took no action whatever upon the petition for referendum which had been certified by the City Clerk as having the required number of names to take the question of the enactment of the ordinances relating to pinball machines to a vote of the people of this city. It is not alleged that it was so ordered" (R. 40).

Quoting from Transcript of Proceedings, pp. 5 and 6:

> ". . .
>
> "THE COURT: Yes, very well. I beg your pardon, Mr. Farley, you are quite correct. However, it will be stipulated that the City Council on the 13th day of May, 1949, moved and passed the resolution which I have just read, that is true, isn't it, or correct?
>
> "Mr. Farley: Yes.
>
> "The Court: Now, the question of the legality or illegality of pinball machines will not be passed on at this time by me. I take it that the crux of this entire

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proceeding is whether or not the people of the City of Spokane shall be given the right to vote as provided in Section 83 of the Charter on referendum. Personally, I am very much in favor of referring questions to the people for their ultimate determination. It is an admitted fact that the advisory ballot taken on the question of the operation of slot machines and pinball machines at the recent election was merely advisory. Why it was done in that manner I do not know. You can draw your own inferences. Every legislative body has an inherent duty to act and perform their duties in a manner that is required under the law and the ordinance in the instant case of the City of Spokane. If I am wrong in my conclusion that the people of the city shall have a right to pass upon the question of the adoption of the ordinance in question the Supreme Court of this State will be very happy to correct my error and I hope that this case is taken to the Supreme Court for determination of the right of referendum on this question" (Record 6-7).

Quoting from Transcript of Proceedings, pp. 9 and 10.

"The Court: There has been no determination of that question. Then, as I understand you, Mr. Losey, you would deprive the people of the right to pass upon this ordinance notwithstanding Section 83 of the City Charter, adopted by the people many years ago, relating to the referendums.

"• • •

"The Court: No, I thought it was understood, Mr. Farley, that from my views expressed to all of you, that the people, in my opinion, were entitled to the right of referendum on this question; that compliance had been made by ten percent or more of the total vote cast at the last election; that that vote had been certified by the City Clerk and that is merely a question of whether the people should be denied the right and privilege that they have reserved to themselves in their Charter and that I was of the view that they should not be" (R. 45-46).

Quoting from Transcript of Proceedings, pp. 14 and 15.

> "The Court: Well, I think there is no question about that, no question at all, Mr. Schiffner. Let me point out to you, if you please, sir, that we have the right of referendum in this State and surely there is no prohibition in any of the state laws in respect to the right of referendum as reserved in the City Charter of Spokane" (R. 49-50).

Quoting from pp. 19 and 20, Transcript of Proceedings.

> "The Court: • • •
>
> "Now, perhaps, this is the way to get at it but still you would deny the right of the people to pass upon the question of whether they wished the ordinance to be enacted and in effect controlling pinball machines.
>
> "• • •
>
> "Gentlemen, it is my opinion that the injunction should be continued in force and effect until such time as the city commissioners or city council of Spokane calls an election, either special or regular, to refer the matter or the question to the people of the City of Spokane, and until the final result of that vote there is no determination" (R. 53-54).

The State Supreme Court did not pass upon or discuss the federal constitutional question involved under the due process clause of the Fourteenth Amendment to the Constitution other than by inference where it states:

> "The argument has been made that, in the interest of local self-government, the ordinance should be submitted to the people of Spokane for their approval or rejection. The contention would be unanswerable were it not for the constitutional provision contained in Art. XI, Sec. 10, and our laws as passed by the legislature. All acts of the people and their representatives, regardless of the virtue of those acts, must yield to the provisions of our constitution" (R. 88).

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It will be observed that under this language and the construction of the state statutes involved in this case, as well as the ordinances and portions of the state constitution, that the people are refused the privilege of enacting a local ordinance the same or similar to an existing state law. The State Supreme Court assumes that the people of Spokane would, if an election were called, legalize the operation of pinball machines. They fail to take into consideration that at the election to be called they, by their vote, might make the operation of pinball machines within the City of Spokane unlawful, the same as the state law is claimed to do by the Supreme Court. In any event, the Supreme Court is in error in assuming that the citizens of Spokane would endeavor to legalize the operation of pinball machines, for such an assumption is assuming facts not in existence, not in the record, wholly conjectural and imaginary, and by that assumption the Supreme Court of the state has in fact placed a prohibition upon the right of referendum within the State of Washington.

It is respectfully called to the Court's attention that in addition to the reasons heretofore cited, as violating the due process clause of the Fourteenth Amendment of the Constitution of the United States, the Supreme Court of the State of Washington in fact found a violation of the criminal statute, in an equity proceedings by "judicial notice" rather than upon any evidence in the record. Such a finding or judgment is in fact a violation of the due process clause as tested and laid down by this Court in the case of *Anderson National Bank* v. *Luckett*, 321 U. S. 233, p. 246; 88 Law Ed. 692, p. 704, when this Court stated:

> "What is due process • • • must be determined by taking into account the purposes of the procedure and its effect upon the rights asserted and all other circumstances which may render the proceedings appropriate to the nature of the case • • • The funda-

mental requirement of due process is an opportunity to be heard upon such notice and proceedings as are adequate to safeguard the rights for which constitutional protection is invoked."

The State Supreme Court by virtue of its decision held in effect that the appellants have violated the criminal statute and are guilty of a crime without allowing appellants the right to defend themselves, all of which was done in an equity proceeding (R. 88). It was specifically requested by the appellants that in the event the State Supreme Court should reverse the case, then in that event the cause be remanded to the trial court to take additional testimony to establish whether or not pinball machines were "in fact" in violation of Remington's Revised Statutes 2472, but such request was denied by the state court (R. 88). The decisions of the state are uniform in holding that a court of equity in an injunction proceedings is limited to the function of establishing whether or not the statute or ordinance is valid or invalid and may not inquire into the question of fact whether in fact a crime has been committed, such question of fact being limited to the forum of a criminal prosecution.

Ajax v. *Gregory,* 177 Wash. 465, at p. 476, 32 Pac. (2) 560;

Great Northern Railway Co. v. *State,* 184 Wash. 648, at p. 652, 52 Pac. (2) 1274;

State ex rel. Potter v. *Maybury,* 161 Wash. 142, p. 149, 296 Pac. 566;

Brennen v. *Seattle,* 151 Wash. 665, at p. 668, 276 Pac. 886.

When the validity of the statute has been determined, the equity suit ends and that validity is determined not upon evidence taken but only upon facts on which the Court may take judicial knowledge.

Ajax v. *Gregory,* 177 Wash. 465, p. 476, 32 Pac. (2) 560;

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Great Northern Railway Co. v. *State,* 184 Wash. 648, p. 652, 52 Pac. (2) 1274;
Gottstein v. *Lister,* 88 Wash. 462, p. 482, 483, 153 Pac. 595.

The equity court concerns itself only with the facts relating to the validity of the statute and not with facts relating to its criminal violation, and the court having jurisdiction over criminal offenses is the forum in which such question of fact must be determined.

State ex rel. Potter v. *Maybury,* 161 Wash. 142, p. 149, 296 Pac. 566.

For the state court to hold that the appellants' business, which up to this time had been lawful and specifically authorized by municipal ordinances, was in fact a violation of a criminal statute, which statute did not specifically define or set out pinball machines, was in fact a violation of the due process clause as defined by *Anderson National Bank* v. *Luckett, supra.*

Dated this 5th day of January, 1950.

JOHN F. GARVIN,
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670—3rd Street,
Seattle, Washington,
CLAUDE L. DAWSON,
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Attorneys for Appellants.

APPENDIX "A"

IN THE SUPREME COURT OF THE STATE OF WASHINGTON, September Term, 1949

No. 31140

Department Two

Filed November 9, 1949

GERALD MILLER and DAVID CAUDILL, for Themselves and for the Benefit of Others Similarly Situated, *Respondents*,

vs.

CITY OF SPOKANE, a Municipal Corporation; WILLIAM P. PAYNE, Commissioner of Public Safety; E. W. PARSONS, Chief of Police; WILLARD TAFT, KENNETH LAWSON, ARTHUR R. MEEHAN and WALLACE N. SPROUL, City Commissioners, all Public Officials of the City of Spokane, Washington, *Appellants*

Appeal from the Superior Court for Spokane County

Honorable W. LOX JOHNSON, *Judge*. Reversed:

Plaintiffs, operators of pinball machines, sought by this action to restrain the city of Spokane and certain of its officers from arresting or molesting plaintiffs while in the possession of, and operating, the machines in the city of Spokane. It was contended in the answer of defendants that the machines were gambling devices and, therefore, prohibited by law.

A trial to the court resulted in the issuance of a permanent injunction which restrained defendants from molesting or arresting plaintiffs or others similarly situated for having in their possession, and operating pinball machines in the city of Spokane. Defendants then appealed to this court, and, in so doing, assign as error the action of the superior court in entering its decree.

The facts, gathered from the admitted portions of the pleadings and the statement of facts, are these:

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December 29, 1947, the city commissioners of the city of Spokane passed two ordinances. One, numbered C 9441, prohibited the playing of pinball machines, by minors, and required that, before any pinball machines should be placed in operation, the operators must have the approval of the commissioner of public safety. The other ordinance, numbered C 9438, amended ordinance numbered C 8352. These last mentioned ordinances authorized the operation of pinball machines and imposed a tax upon them.

March 28, 1949, the city commissioners passed ordinance No. C 10078. This act repealed ordinance No. C 9441, and prohibited the possession, maintenance, conduct, operation or use of pinball machines. Prior to the effective date of ordinance No. C 10078, the voters of the city of Spokane filed, in accordance with the provisions of the city charter, a referendum petition signed by the required number of voters, which challenged and sought to submit to the voters ordinance No. C 10078. Thereafter, on May 13, 1949, the city commissioners of the city of Spokane passed a resolution which notified all possessors or users of pinball machines that they would be prosecuted. This action was then instituted.

Respondents maintain that the referendum petition, having been properly signed and filed, renders ordinance No. C 10078 ineffective unless and until it may be adopted by the people. Appellants, on the other hand, take the position that a pinball machine is a gambling device prohibited by the general laws of the state of Washington, and that neither the city commission nor the people of the city have the power to enact an ordinance in conflict with general laws of the state. As we understand them, they contend further that, a defeat of ordinance No. C 10078 would in effect legalize the operation of pinball machines.

We agree that a city, regardless of the fact that its charter provides for a referendum, may not pass any ordinance which puts into effect a law which is in conflict with the statutes of the state. Even a casual survey of the ordinances, to which we have referred, brings to light the fact that the defeat of ordinance No. C 10078 would leave intact those ordinances of the city which legalize the owning

and operating of pinball machines. The rule to which we have referred is laid down in Art. XI, Sec. 10, of our state constitution, where it provides:

> ". . . cities or towns heretofore or hereafter organized and all charters thereof framed or adopted by authority of this constitution shall be subject to and controlled by general laws."

In Neils v. Seattle, 185 Wash. 269, 53 P. (2d) 848, this court said:

> "A general law enacted by the legislature is superior to, and supersedes, all charter provisions inconsistent therewith."

The case of Armitage v. Camden, 5 N. J. Misc. 129, 135 Atl. 661, is so decisive of the question presented here that we quote it in full:

> "Per CURIAM:
>
> "This writ brings up for review a resolution of the board of commissioners of the city of Camden, passed August 12th, 1926, submitting to the legal voters of that city for their action, by approval or disapproval, a proposed ordinance permitting baseball games, either amateur or professional, on Sundays.
>
> "There are several reasons argued why this resolution should be set aside, but the matter can be disposed of under a single one of these, and that is that no action taken or to be taken by the authorities of the city of Camden, or the legal voters thereof, in the face of an emphatic and positive legislative declaration of policy, can be effective. This is so fundamental that no citation of authorities is called for.
>
> "The proposed ordinance, if adopted, would by its terms legalize acts in the city of Camden which the supreme law making body of the state has prohibited by that legislation known as the Vice and Immorality act.

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"The resolution under review must therefore be set aside, with costs."

Among the decisions of this court lending support to this conclusion we note the following: State ex rel, Seattle v. Carson, 6 Wash. 250, 33 Pac. 428; Benton v. Seattle Electric Co., 50 Wash. 156, 96 Pac. 1033; State ex rel. Clausen v. Burr, 65 Wash. 524, 118 Pac. 639; Dolan v. Puget Sound Traction Light & Power Co., 72 Wash. 343, 130 Pac. 353; and Misich v. McGuire, 24 Wn. (2d) 758, 167 P. (2d) 462.

Rem. Rev. Stat., Sec. 2472, provides:

"Possession of gambling devices. Every person who shall have in his possession or shall permit to be placed or kept in any building or boat, or part thereof, owned, leased or occupied by him, any table, slot machine, or any other article, device or apparatus of a kind commonly used for gambling, or operated for the losing or winning of any money or property, or any representative of either, upon any chance or uncertain or contingent event, shall be guilty of a gross misdemeanor."

A city may enact ordinances for the punishment of offenses already made punishable by state law. Seattle v. Chin Let, 19 Wash. 38, 52 Pac. 324.

Is a pinball machine a gambling device?

It was stipulated during the trial that certain facts as alleged in the city's affirmative defense were true. That defense was as follows:

"The cabinets of said pinball machines have a flat horizontal top in the shape of a rectangular table, mounted upon a base, with one end of the table at a lower elevation than the other. The game is played on the top of said table by the use of a plunger which propels a metal ball to the top of said table, from which point the ball rolls to the lower end unless it falls into one of a number of holes in the surface of said table. There are four series of holes, numbered from 1 to 7, inclusive, which numbers correspond to numbers lighted on a backboard set above the high end of the

table. The game is played by placing a nickel in a coin slot which causes a metal ball to drop into a receptacle from which receptacle it may be elevated to the playing surface of the board by the player, so that the ball is in a channel which extends the length of the right-hand side of said table and directly in front of the plunger. The insertion of the coin also causes one or several numbers of the backboard to light, and the object of the game is then for the player to put the metal ball into one of the holes on the table which corresponds with a number or numbers which may be lighted on the backboard. The insertion of the coin also indicates the odds which the player will receive in the event he is successful in putting the ball into a proper hole. The ball is shot by pulling the plunger back along a scale, marked by degrees, and then releasing the plunger. The distance from the ball at which the plunger is released determines the speed which the ball will have when propelled from the channel on the playing surface on the table. In addition to the holes on said table, there are metal springs and pins at various places between the holes. If the player is successful in lodging the ball in a hole which corresponds to one of the numbers lighted on the backboard, the machine automatically returns to him the number of nickels shown in the list of odds on the backboard, and, if not successful in lodging the ball in one of said holes, he receives nothing."

It was further agreed in open court as follows:

". . . that said machines are so constructed that the lighted numbers on the back-board are determined and automatically lighted by the machine and the player has no choice in the selection thereof on the first coin but ultimately he may obtain the number which he desires to select by inserting additional coins until such number appears. Likewise, the odds which will be paid if the player is successful are automatically determined by the machine without any choice

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on the part of the player and all odds except the minimum odds to be paid are selected automatically by the machine. Said machines are so constructed that the pitch of the incline of the playing surface can be adjusted by the person having control of the machine but not the player, which pitch determines the speed of the ball as it travels downward over the playing surface."

We now call attention to cases from nineteen states of the Union which declare that pinball machines are gambling devices.

A great number of these cases may be found in 135 A. L. R. 149. Other cases are: State ex rel. Dussault v. Kilburn, 111 Mont. 400, 109 P. (2d) 1113, 135 A. L. R. 99; State v. Wiley, 232 Iowa 443, 3 N. W. (2d) 620; Pepple v. Headrick, 64 Idaho 132, 128 P. (2d) 757; Kraus v. Cleveland, 135 Ohio St. 43, 19 N. E. (2d) 159; Approximately Fifty-Nine Gambling Devices v. People ex rel. Burke, 110 Colo. 82, 130 P. (2d) 920; People v. One Pinball Machine, 316 Ill. App. 161, 44 N. E. (2d) 950; Steely v. Commonwealth, 291 Ky. 554, 164 S. W. (2d) 977; Hunter v. Mayor and Council of Teaneck Tp., 128 N. J. L. 164, 24 A. (2d) 553; Urban's Appeal, 148, Pa. Super Ct. 101, 24 A. (2d) 756; State v. Betti, 21 N. J. Misc. 345, 34 A. (2d) 91; Steed v. State, 189 Ark. 389, 72 S. W. (2d) 542; and Prickett v. State, -- Okla. Crim. —, 200 P. (2d) 457.

We shall content ourselves with referring to but one of the cases, and that one is the case of State ex rel. Dussault v. Kilburn, *supra.* In that case, the pinball machine was described as

". . . a cabinet or stand about three and one-half or four feet high with a sloping plane or surface studded with small steel pins and containing holes. It has a catapult by the use of which a marble or ball is shot onto the plane with the object of having the ball enter one of the paying holes. To play the game a person places a nickel or a trade check in a slot in the machine. This places the marble or ball in a position for playing.

The trade checks are redeemable in merchandise at the rate of 5 cents or more for each trade check as stamped on each at Kilburn's place of business, and not elsewhere. The machine is so constructed that the pay-off is in trade checks only and not in money. The number of checks received in the pay-off varies according to the hole in which the marble or ball falls. If the player is not successful in getting the marble into one of the proper holes, he receives nothing on the play. The marble or ball is shot from a spring or mechanical device. The power with which the ball is shot depends upon how far back the spring is pulled and, hence, is subject to the control of the player. . . .

" 'The board, in turn, has holes with numbers below the holes corresponding with the numbers that may be lighted on the back board; the lights naturally are operated from electrical spinners; the spinners turn and stop on certain switches that turn on certain lights on the back board; then the player must shoot the ball into a hole that corresponds with the light that is lit. The machine also has an electrical and mechanical pay-out mechanism that pays out trade checks, hickeys, etc. Well, after the coin is inserted in the slot that starts the machine in operation why there is a spinner or electrical disk, a disk with electrical fingers, or brass fingers, that turn on from an electrical motor, we might say a vibrator, and these fingers, in turn, stop on certain electrical switches that light corresponding numbers on the back board; there may be one light or up to seven, there are seven different characters, and from one to seven may be lighted on this particular operation; then in turn the player must shoot at the hole that corresponds with the number that is lighted in the back board."

In its determination that the machine was a gambling device, the court said:

"The question before us is whether the use of the machine constitutes a nuisance under section 11124, Re-

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vised Codes. If its use constitutes gambling as defined by other sections, then the building in which it is used is a nuisance. Whether or not it is a gambling device depends upon section 11159, Revised Codes, as amended by Chapter 153, Laws 1937. That section makes it a misdemeanor for any person to conduct, run or operate 'any game of chance played with * * * any device whatsoever,' or to run or conduct or keep any slot machine, or other similar machine or device, for 'money, checks, credits, or any representative of value.' It provides, however, that certain types of business may procure a license to operate tables for the use and pleasure of their customers where certain games may be played for pastime and amusement 'and for the maintenance of which a charge may be made, to be paid by the users by the purchase of trade checks which must be redeemable in merchandise at the going retail price of such merchandise, which is the stock in trade of such business.' It also provides that upon the payment of a license, places of business may exhibit for use and sale to customers 'trade stimulators, such as pull boards and ticket boards, where each board so used returns to the owner or business not to exceed the going retail price of the goods disposed of and sold and disposed of through the use of the same.'

"The court was correct in holding that the device in question is condemned by Chapter 153. Machines of similar construction and operation have been held to be gambling devices. In *Howle v. City of Birmingham*, 229 Ala. 666, 159 So. 206, 209, the court in speaking of a machine not wholly dissimilar to that here said: 'The game is clearly a gambling contest with the owner and operator on the one side, and the members of the public on the other, who, while seeking a moment of diversion, are willing to hazard a nickel with the hope of winning three times that amount, and in which, as the facts alleged in the bill and the admitted facts show, the owner and operator hold the whip handle, and eventually win the stakes in the profits which the machine takes.'"

The court also quoted with approval from State v. Coats, 158 Ore. 122, 74 P. (2d) 1102, as follows:

> " 'To say that the operation of pinball machines or slot machines involves any substantial degree of judgment or skill severely strains the credulity of any reasonable-minded person. Such machines are constructed to win, and they do win. In a game involving skill or judgment, the player has a fair opportunity to win. Such opportunity is not afforded the player who "bucks" a slot machine or a pinball machine. No judgment or skill which the player may exercise has any appreciable effect upon the result. * * * It is perfectly obvious from the information that the only act which the player can, by possibility, perform to influence the result of this operation is to pull back the plunger a greater or lesser distance, and thereby, in its initial stages, regulate the speed of the ball. He can send the ball to the playing surface at greater or lesser speed, but he cannot guide or influence its course after it gets there. He cannot aim at anything, as in a game of billiards, or baseball or golf, but is absolutely limited by the mechanics of the device to propelling the ball along the so-called channel to the upper end of the table.' "

Based upon these cases, we hold that the pinball machines named in the Spokane ordinance were gambling devices within the meaning of Rem. Rev. Stat., Sec. 2472, and, as such, could not be legalized by either the city commissioners of the city of Spokane, or the people of that city acting in a legislative capacity.

Respondents contend that if this case is reversed, it should be sent back to the superior court for the purpose of taking additional evidence. We cannot so hold. The case was submitted to the court upon the stipulated facts. It was decided upon the facts. This court, hearing the cause *de novo*, decided the case upon those facts.

Respondents are of the opinion that Rem. Rev. Stat., Sec. 2472, was, by implication, repealed by Rem. Rev. Stat. (Sup.), Sec. 2472-1. We cannot yield our assent to that

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view. Repeals by implication are not favored. Abel *v.* Diking & Drainage Imp. Dist. No. 4, 19 Wn. (2d) 356, 142 P. (2d) 1017.

A reading of Rem. Rev. Stat. (Sup.), Sec. 2472-1, in connection with other portions of chapter 119, Laws of 1937, of which it is a part, indicates in unmistakable language that it had to do entirely with slot machines. With these considerations in mind, we hold that Rem. Rev. Stat., Sec. 2472, was not repealed by the later act.

The argument has been made that, in the interest of local self-government, the ordinance should be submitted to the people of Spokane for their approval or rejection. The contention would be unanswerable were it not for the constitutional provision contained in Art. XI, Sec. 10, and our laws as passed by the legislature. All acts of the people and their representatives, regardless of the virtue of those acts, must yield to the provisions of our constitution.

The judgment of the trial court is reversed, with instructions to dismiss the action.

SIMPSON, *C. J.*

We concur:

ROBINSON, *J.*
MALLERY, *J.*
HILL, *J.*
HAMLEY, *J.*

APPENDIX "B"

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF SPOKANE

No. 124,422

GERALD MILLER, et al., *Plaintiffs*,

vs.

CITY OF SPOKANE, et al., *Defendants*

Be it remembered:

That the above-entitled action came regularly on for trial and determination on June 3rd, 1949, before the Hon. W. Lon Johnson, Judge, without a jury, in the Superior Court of the State of Washington, in and for the County of Spokane, Spokane, Washington, sitting pro tem therein; the plaintiffs appearing in person and by Wilmot W. Garvin and Clarence M. George, their attorneys; the defendants appearing by B. A. Farley and Paul F. Schiffner; and both sides having announced they were ready for trial;

Whereupon, the following proceedings were had, to-wit:

The Court: We have had quite an extensive pre-trial conference in this case, the case of Gerald Miller and David Caudill versus the City of Spokane, and others; the plaintiffs represented by Mr. Wilmot W. Garvin and the defendants represented by Mr. Farley and Mr. Schiffner.

My practice has been for many years to have pre-trial conferences in all cases and out of those conferences with counsel we usually are able to eliminate many elements that are really of no importance in the trial of the case. However, after conference with the attorneys representing the plaintiffs and defendants, after stating to them frankly my view of the pleadings, the facts and the law, and they equally as frank with me, we have come to certain conclusions based upon my opinion of what ought to be done in this case.

At the time the City Charter was adopted and approved by the people of the City of Spokane, Section 83 of that

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Charter provides that a referendum may be invoked under certain conditions, on acts and ordinances, particularly, of the City Council. In order that there may be no misunderstanding of the conclusions arrived at by respective counsel and myself, I shall read that Charter provision as alleged in plaintiffs' complaint: (reading)

"That Section 83 of the Charter of the City of Spokane reads as follows:

> "If prior to the date when any ordinance shall take effect a petition signed by qualified electors equal in number to ten percentum of the entire vote cast at the last preceding general municipal election, shall be filed with the Clerk protesting against the enactment of such ordinance, it shall be suspended from taking effect. Immediately upon the filing of the petition the Clerk shall do all things required by Section 82B of this Article. Thereupon the council shall immediately reconsider such ordinance and, if it do not entirely repeal the same, shall submit it to public vote at the next municipal election; or, the council in its discretion may call a special election for that purpose; and such ordinance shall not take effect, unless a majority of the qualified electors voting thereon at such election shall vote in favor thereof;"

and further the allegations of that paragraph, which is Paragraph V: (reading)

> "That prior to the date when said Ordinance C 10078 was to take effect a petition signed by qualified electors equal in number to ten percentum of the entire vote cast at the last preceding general municipal election was filed with the City Clerk protesting against the enactment of such ordinance, and that the City Clerk within the required time certified to the City Council that qualified and registered electors equal in number to ten per cent of the entire vote cast in the last preceding general municipal election had signed said petition for referendum. That on May 13, 1949, the City Commissioners in council reconsidered said

Ordinance No. C 10078 and moved that said ordinance be submitted to popular vote at the next municipal election, as provided by the City Charter."

You will observe, gentlemen, that the City Council, which is your legislative body, evidently took no action whatever upon the petition for referendum which had been certified by the City Clerk as having the required number of names to take the question of the enactment of the ordinance relating to pin ball machines to a vote of the people of this city. It is not alleged that it was so ordered.

Then, in Paragraph VI:

"That the said petition was signed by qualified and registered electors equal in number to ten per cent of the entire vote cast at the last preceding general municipal election; that immediately upon the certification by the City Clerk that qualified and registered electors of the City of Spokane equal to ten per cent of the entire vote cast at the last preceding general municipal election had signed the above-mentioned petition for referendum which was filed with said City Clerk, Ordinance No. C 10078 was suspended from taking effect, but that contrary to the prohibition and mandate by virtue of the referendum filed and certified and by virtue of the said section of the Charter of the City of Spokane on the 13th day of May, 1949, said City Commissioners in council moved and passed the following resolution:

"All persons operating or having in their possession pinball machines contrary to Remington's Revised Statutes 2472 and the provisions of Section 22 of Ordinance No. C 1377 of the City of Spokane, be hereby notified that arrest for such violations will commence on the 23rd day of May, 1949."

"That such action by the City Council is in direct violation and contrary to the city charter and is an attack upon the right of referendum of the registered and qualified voters of the City of Spokane, as established in said charter."

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It is now agreed between respective counsel that it will be stipulated in open court that Section 83 of the City Charter is as I have read and as alleged in the complaint. It will, also, be stipulated that the City Council has refused up to the present time to take any action whatever whereby the people of the City of Spokane would be permitted to vote upon this question, the legality or illegality, is that correct?

Mr. Farley: Just to clarify the situation, your Honor stated a few moments ago that the Council took no action. May I call your Honor's attention to the last sentence in Paragraph V of the Complaint in which it is stated that on May 13th, 1949, the city commissioners in council reconsidered said ordinance and moved that said ordinance be submitted to popular vote at the next municipal election and, then, there were the added words, which I think counsel will concede "if such action is necessary".

The Court: Yes, very well. I beg your pardon, Mr. Farley, you are quite correct. However, it will be stipulated that the City Council on the 13th day of May, 1949, moved and passed the resolution which I have just read, that is true, isn't it, or correct?

Mr. Farley: Yes.

The Court: Now, the question of the legality or illegality of pinball machines will not be passed on at this time by me. I take it that the crux of this entire proceeding is whether or not the people of the City of Spokane shall be given the right to vote as provided in Section 83 of the Charter on referendum. Personally, I am very much in favor of referring questions to the people for their ultimate determination. It is an admitted fact that the advisory ballot taken on the question of the operation of slot machines and pinball machines at the recent election was merely advisory. Why it was done in that manner I do not know. You can draw your own inferences. Every legislative body has an inherent duty to act and perform their duties in a manner that is required under the law and the ordinance in the instant case of the City of Spokane. If I am wrong in my conclusion that the people of the city shall have a right to pass upon the question of the adoption of the ordinance in question the

Supreme Court of this State will be very happy to correct my error and I hope that this case is taken to the Supreme Court for determination of the right of referendum on this question.

Now, gentlemen, you may stipulate as you have agreed upon the affirmative defense as alleged by the City of Spokane and its commissioners.

Mr. Garvin: May it please the Court, if I may make an addition to the statement made by the Court in relation to the Court and counsel being present in chambers on the pretrial discussion, may the record show that Mr. Losey, W. C. Losey, appeared as amicus curiae, too.

The Court: And that you all came there, except Mr. Losey, to confer at my request.

Mr. Garvin: It is stipulated by the parties through their respective counsel that the facts as alleged in the defendant City of Spokane's affirmative defense are true. It is further stipulated that in regard to the second affirmative defense, second paragraph of the affirmative defense that it shall read as follows: that said machines are so constructed that the lighted numbers on the back-board are determined and automatically lighted by the machine and the player has no choice in the selection thereof on the first coin but ultimately he may obtain the number which he desires to select by inserting additional coins until such number appears. Likewise, the odds which will be paid if the player is successful are automatically determined by the machine without any choice on the part of the player and all odds except the minimum odds to be paid are selected automatically by the machine. Said machines are so constructed that the pitch of the incline of the playing surface can be adjusted by the person having control of the machine but not the player, which pitch determines the speed of the ball as it travels downward over the playing surface.

The balance of the pleadings, being conclusions, are denied; the balance of Paragraph II, being conclusions, are denied. Mr. George, likewise, has some ordinance to be admitted in evidence by stipulation.

Mr. Farley: Just a moment, Mr. Garvin, so that there will be no question Mr. Garvin read into the record what we

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might say is substituted for our second paragraph of the affirmative defense and I will ask him, now, if it isn't your intention that those facts as read are admitted?

Mr. Garvin: Yes, that is true. It is further stipulated that the following sections of the Charter of the City of Spokane and the ordinances either are in effect, were in effect at one time or were repealed or amended and they have relation to the case at bar:

Article IX Section 83 relating to the referendum, Chapter 1.

Ordinance No. C 9441 relating to the regulation and control of pinball machines in the City of Spokane.

Ordinance No. C 1377 relating to gambling within the City of Spokane.

Ordinance No. C 1377, Section 22, relating to gambling devices within the City of Spokane.

Ordinance No. C 8178, relating to the playing of slot machines by minors.

Ordinance No. A 1250, relating to slot machines in the City of Spokane.

Ordinance No. C 177, relating to—10077, ten thousand seventy-seven, relating to the playing of slot machines within the City of Spokane.

Ordinance No. C 10078, relating to the playing of pinball machines in the City of Spokane.

And Ordinance No. C 8352, relating to taxation in the City of Spokane,

The Court: Any objections to the admission?

Mr. Farley: No, with this exception, however, some of these ordinances have been repealed and we would like to take the time to go through them so that the record will show which of these ordinances have been repealed.

The Court: Very well, Mr. Farley. I believe that Mr. Mr. Garvin has alleged in his complaint those that were repealed by number and the ordinances that were the repealing ordinances.

Mr. Garvin: That is true. They were either repealed or amended. The purpose of that, if it please the Court, was merely to show the historical background chronologically.

Mr. Farley: Maybe you can clear this thing up for me. Are all these ordinances that you are now introducing pleaded in your complaint? I think that there are some that are not.

Mr. George: They are either pleaded in the complaint or set up as exhibits.

The Court: Do you wish to examine the original complaint?

Mr. Garvin: If that is not true, I am willing to stipulate so that the record will be perfectly clear on that with Mr. Farley.

The Court: Mr. Losey, do you have any suggestions to make at this time as a friend of the Court?

Mr. Losey: I think the proceeding is going along in order. I think, however, there is some matter that ought to come before the Court as to whether or not it's possible to have a referendum on a law that is illegal.

The Court: There has been no determination of that question. Then, as I understand you, Mr. Losey, you would deprive the people of the right to pass upon this ordinance notwithstanding Section 83 of the City Charter, adopted by the people many years ago, relating to the referendums.

Mr. Losey: It is my contention, your Honor, that this ordinance which is being referred to is wholly supernumerary and wholly unnecessary and illegal and that you can not have a referendum on an illegal law. I think Mr. Schiffner has authority to sustain that position.

Mr. Farley: I thought we had the understanding that your Honor would give us the opportunity to be heard on that one point, on the referendum question.

The Court: At this time?

Mr. Farley: Yes, or am I mistaken in that respect?

The Court: No, I thought it was understood, Mr. Farley, that from my views expressed to all of you, that the people, in my opinion, were entitled to the right of referendum on this question; that compliance had been made by ten percent or more of the total vote cast at the last election; that that vote had been certified by the City Clerk and that is merely a question of whether the people should be denied the right and privilege that they have reserved to

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themselves in their Charter and that I was of the view that they should not be. Now, if you wish to be heard, I shall not preclude you.

Mr. Farley: I am sorry if I misunderstood your Honor. I understood clearly what your Honor has just said. I thought you had agreed that we would have a right to be heard on that question.

The Court: All right. Of course, I have expressed myself on a number of questions, including the famous or infamous slot machines. I shall withdraw the word "infamous". Judge Pettijohn decided that question in 1947, from which there was no appeal. I stated that to you men and you agreed that was true. And I said the record was filled with inconsistencies from that time up to the present; that I disliked very much and resent at any time and at all times a mockery being made of the courts. And, further, I stated that that is precisely what has been done by reason of the inconsistencies of ordinances, repealing ordinances and enacting ordinances since the decision of Judge Pettijohn. Now, that has no bearing upon this question except that he held that slot machines were gambling devices beyond any question of doubt, as stated and set forth in the constitution of the State and by city ordinances. I was even unable to find his opinion in the case that he tried. It does have a correlation and a connection with this case but I was of the view, Mr. Farley, that by reason of the explicit statements contained in Section 83 of the Charter of the City of Spokane a right of referendum which the people had reserved to themselves and with their full compliance, as shown by the certification of the vote by the City Clerk, that they should not under any pretext or fallacious reasoning be denied and deprived of that right of referendum. I think I used that language, approximately.

Mr. Schiffner: Your Honor please, we would like to argue the point. We don't believe in this case that the council have the right to refer this to the people.

The Court: I never like to deny the right of counsel, Mr. Schiffner, to argue any question of law that they think is pertinent and proper. Do you mean to say that you

have cases, let us say, holding the constitution of the State or of city charters where the people have made certain reservations in respect to the rights that they have retained for themselves, that the courts have held that they shall ever be deprived of those rights? The truth is, Mr. Schiffner, as I expressed in chambers, that too much of the government has been taken from the people, as I view it, of our respective states, cities and counties and even including the national government. Are we going to continue that policy?

Mr. Schiffner: We generally concede your Honor's general observations; with reference to referendums we heartily agree with reference to your observations. However, with reference to this particular case we do not believe that they have a right to refer this matter to the people for a vote, notwithstanding the procedures of the Charter which were followed. I think if your Honor will hear us out we can convince you that they do not have that right to bring this to a vote at the next election, if our position is sound.

The Court: Now, listen, I don't want to deprive you of the right to argue the questions of law in this case but I will say this to you very frankly: you must have cases that are definite, positive and are in point. They have held, referring to our own Supreme Court, that the people, where they reserve to themselves certain inalienable rights, cannot be deprived of them by the assertion that an ordinance or a statute is illegal and, therefore, they are not entitled to that right of referendum. You will have to show me most clearly.

Mr. Farley: I wonder, your Honor, if we shouldn't complete our record, first.

The Court: Oh, I thought you had finished.

Mr. Farley: No. We agree that the ordinances which counsel has offered here may be received and I would like to have counsel stipulate that Ordinance No. C 1377 passed the City Council on July 3rd, 1913, and entitled "An Ordinance for the preservation of Public Peace, Safety, Morality and Good Order in the City of Spokane, providing penalties for the violation thereof and declaring an emergency" might be considered as if it had been offered in evidence?

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The Court: Will you so stipulate, Mr. Garvin?

Mr. Garvin: We offered that ourselves.

The Court: That is my understanding.

Mr. Farley: Oh, I am sorry. I missed that number, it seems like.

The Court: Now, are there any other ordinances or parts of ordinances or repeals or enactments that you wish to introduce in this case?

Mr. Farley: None on the part of the defendants.

The Court: Now, Mr. Schiffner.

Mr. Schiffner: Your Honor, it is a little embarrassing in view of some more recent remarks that the Court has made as to how to proceed with this argument. We want to make a frank and full discussion of the law that we think is applicable to this case. As I say, we generally believe in all legal laws that the people have a right to referendum and we have jealously guarded, on past occasions, that right and we have been in this court defending it. However, in this case we do not believe that the matter of the continued operation of the pinball machines is a question that is referable to the people and I would like to proceed with my reasons, if the Court please, for making that statement.

Section 10, of Article XI of the State Constitution provides as follows, in part: (section read.)

The Court: Well, I think there is no question about that, no question at all, Mr. Schiffner. Let me point out to you, if you please, sir, that we have the right of referendum in this State and surely there is no prohibition in any of the state laws in respect to the right of referendum as reserved in the City Charter of Spokane.

Mr. Schiffner: Well, my position, your Honor, is that pinball machines are outlawed by a specific section of the state law and if our city ordinances or Charter are inconsistent with that, they must give way to the state law and this is preliminary to what I am going to get to on the question of referendum (continues reading).

The Court: Will you please pardon the interruption. Mr. Garvin advised me this morning on my specific request to all of you if there had been any decisions by the lower

courts, Superior Courts, in this state in respect to the legality or illegality of pinball machines. You heard his statement to the effect that Judge Wright or Judge Wilson, which was it?

Mr. Garvin: Judge Wright.

The Court: Judge Wright in the Superior Court has held in two cases, you are unable to furnish me a copy of the opinion?

Mr. Garvin: I have just received it.

The Court: That in his view pinball machines were not illegal and did not contravene criminal statutes relating to them. Now, may I ask you, Mr. Garvin, are those cases on appeal to the Supreme Court?

Mr. Garvin: No, none of them.

The Court: When were they decided?

Mr. Garvin: July 22nd, 1938. Well, the judgment is signed on the 10th day of February, 1941. Maybe this is a different case. Yes, there are two cases.

The Court: Pardon the interruption.

Mr. Garvin: There are two cases, one on February 10th, '41, and one on July 22nd, 1938. Our Supreme Court has never spoken on pinballs.

The Court: I am not interested at this time in these proceedings as to the legality or illegality of pinball machines. If it has been held by other Superior Courts in this State that they are legal in their operation, if that is true it would have very great weight with me.

Mr. Schiffner: Well, it is my position, then, your Honor, and I would like to have the reporter take this, it is our position that the pinball machines, in the operation of the pinball machines as stipulated here, that they are in violation not only of the state law but of the city ordinances. That under the decisions of the courts that no licences or permits issued by the cities would, under the authorities, either legalize these machines or authorize their continued operation and the fact that the machines were taxed does not offer a legal right to their continued operation. I have submitted the brief to your Honor covering those authorities. I do want to read one case on the question of referendum.

The Court: Very well.

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Mr. Schiffner: And, of course, apparently your Honor doesn't agree with our position but, in any event, you have been kind enough to listen.

The Court: So that you may understand definitely, Mr. Schiffner, I will repeat at this stage of the proceedings in this case I am not interested particularly in the legality or illegality of the operation of pinball machines. Frankly, I have always considered slot machines well-designated when they are called the one-armed bandits but I have thought without any opinion, expressed or otherwise, that the operation of pinball machines was a degree lower in the scale of unlawful operation, only lower than that of the operation of slot machines. And to proceed a little further for your information it is possible that all of the harm and the injury is done and the disruption of homes and the taking of money for grocery purposes, clothing and the sustenance of the family by the pinball machines, such as we all know is done by slot machines. Now, you may proceed.

Mr. Schiffner: Thank you, your Honor. For the purpose of the record I would like to state and for the advice of the Court that you should be further advized that on March 28th, 1949, the City Council did, as alleged in Paragraph V of the petition of plaintiff, pass Ordinance No. C 10078, which definitely prohibits the possession, maintenance and operation of pinball machines and other devices of like character in the City of Spokane. "That a petition was filed by qualified electors sufficient in number to refer the above ordinance to the people at the next municipal election, as provided for in Section 83 of the Charter of the City of Spokane. And that under the Charter provision said Ordinance No. C 10078 is suspended from taking effect until a majority of the qualified electors voting at said election shall vote the said ordinance • • • (continues reading)." That is our position, your Honor. I have one case that I would like to call to the Court's attention, too. It's a very brief case and I should like to read it all.

The Court: Very well.

Mr. Schiffner: The case is Armitage *v.* The City of Camden—135 Atlantic, 660. It is from the Supreme Court of New Jersey and this is the opinion: (reading case).

The Court: Well, Mr. Schiffner, may I ask you one question, please, sir? The City Council by ordinance in this city has legalized the operation of slot machines in clubs, designated clubs, that is true, and, as I understood the opinion of Judge Pettijohn, that is in contravention of the Constitution of the State of Washington relating to gambling, and what is your explanation? And your reason, if any, for the inequity?

Mr. Schiffner: I am not the City Council.

The Court: I know, but you are arguing on their behalf.

Mr. Schiffner: I will say we argued just as vehemently in that case.

The Court: May I interject, you wrote a splendid brief.

Mr. Schiffner: Mr. Farley was prepared to argue the legality of these machines this morning.

The Court: The point is, gentlemen, you can see readily I am not interested in whether the City of Spokane permits the operation of slot machines or pinballs, or both, but the question that is uppermost in my mind is the Charter provisions and the ordinances that have been enacted from time to time and I would suggest to you that somewhere, some time there ought to be some consistency in handling these questions. Now, perhaps, this is the way to get at it but still you would deny the right of the people to pass upon the question of whether they wished the ordinance to be enacted and in effect controlling pinball machines. It appears to me, gentlemen, that there are so many inconsistencies, to speak most mildly, in all of the proceedings and particularly since the opinion of Judge Pettijohn that it comes to the point where it is almost revolting and I am not directing criticism at anyone particularly. It is my understanding from press reports that hundreds of thousands of dollars are contributed for worthy causes by some of the clubs that are permitted to operate. Still this is going rather far afield. I conceive that it is done for the purpose of rather taking the curse off of slot machines.

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Gentlemen, it is my opinion that the injunction should be continued in force and effect until such time as the city commissioners or city council of Spokane calls an election, either special or regular, to refer the matter or the question to the people of the City of Spokane, and until the final result of that vote there is no determination.

You may prepare exceptions, of course. May I say to you, Mr. Farley and Mr. Schiffner, it is my hope that you take this case to the Supreme Court. If I am reversed I shall be pleased to know what the law is as related by our highest court. If I am affirmed, as I believe I will be, then, there will be justification, at least, to myself for the judgment or opinion that I have rendered in this case. Anything further?

You may adjourn court, Mr. Bailiff.

(Whereupon, court was adjourned until 9:30 a.m. on June 4th, 1949.)